UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

IN RE *MARSHALL COMPLEX FIRE* JASON AND LAURA JONGEWARD, husband and wife; GORDON and JEANNIE JONGEWARD, husband and wife as Trustees of the Jongeward Family Trust; RICHARD AND PATRICIA LINN, by Jennifer Linn, Attorney in Fact; ERIC and LISA KOOHNS, husband and wife; CHARLES POTTER, a single man; JOANN POTTER, a single woman; SCOTT AND MICHELLE SIMMONS, husband and wife; RICK AND CHRIS HOSMER, husband and wife; JACK GILLINGHAM, a single man; KEITH AND MARIANNE GESCHKE, husband and wife; and RANDY AND COLLEEN GESCHKE, husband and wife, and GEANA VAN DESSEL, a single woman,

Plaintiffs,

v.

BNSF RAILWAY COMPANY, commonly known as THE BURLINGTON NORTHERN SANTA FE RAILWAY, a Delaware corporation doing business in the State of Washington,

Defendant.

NO. CV-09-0010-RMP

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Before the Court is Plaintiffs' summary judgment motion (Ct. Rec. 66). Pursuant to FED. R. CIV. P. 56, the Plaintiffs move the Court to determine the

Defendant's liability as a matter of law. In addition, the Plaintiffs move the Court to strike Defendant's affirmative defenses pursuant to FED. R. CIV. P. 56 and FED. R. CIV. P. 11(b)(3) and (4).

The Court has considered the Plaintiffs' Motion to Determine Liability as a Matter of Law and to Strike Defendant BNSF's Affirmative Defenses Pursuant to FED. R. CIV. P. 11(b)(3) and (4) and FED. R. CIV. P. 56 (Ct. Rec. 66) and accompanying brief (Ct. Rec. 67) declaration and exhibits (Ct. Rec. 69), the Defendant's response (Ct. Rec. 72) declaration and exhibits (Ct. Rec. 76), Plaintiffs' reply memorandum (Ct. Rec. 82),and the remaining pleadings and file in this case.

The Court held a telephonic hearing on March 25, 2010. Mr. Richard Eymann and Mr. Steven Jones appeared on behalf of the Plaintiffs. Mr. Jeffrey Aultman appeared on behalf of the Defendant (Ct. Rec. 94).

II. BACKGROUND

The following facts are either undisputed or, where a dispute exists, viewed in the light most favorable to the Defendant.

Plaintiffs are individuals and married couples who have an interest in real property in the Marshall area of Spokane County, Washington (Ct. Rec. 53, p. 2-4). Defendant BNSF Railway Company, also known as the Burlington Northern Santa Fe Railway Company ("BNSF"), operates a railroad in Washington and elsewhere on railroad lines that it owns and maintains, including a line between Spokane, Washington, and Pasco, Washington. (Ct. Rec. 53, p. 5); (Ct. Rec. 54, p. 3-4).

On August 11, 2007, a BNSF train consisting of three locomotives and seventy railcars left Spokane around 10:45 a.m. headed for Pasco (Ct. Rec. 64, p. 4). The weather that day was hot and dry with light wind (Ct. Rec. 65, p. 11, 14). As the train passed through Marshall, approximately ten miles southwest of Spokane, fire broke out at six points along the BNSF right-of-way and spread

quickly to damage two houses and more than 360 acres (Ct. Rec. 65, p. 14). Many trees were burned (Ct. Rec. 53, p. 6). When the train was approximately five or six miles past Marshall, a BNSF dispatcher called Bo Hansen, the conductor on the train, and requested that Mr. Hansen perform a walking inspection of the train as soon as feasible (Ct. Rec. 65, p. 29). Mr. Hansen and the rest of the crew stopped the train, and Mr. Hansen walked up and down the length of the train and saw nothing wrong (Ct. Rec. 65, p. 29-30). Mr. Hansen testified in his deposition that he also had looked back several times between Spokane and Cheney, the latter of which is past Marshall, to view the train and watch out for "[s]moke, cars dragging, sparks, fire, basically anything that could go wrong with the train" (Ct. Rec. 65, p. 31).

The Washington State Department of Natural Resources ("DNR") responded to the fire and investigated its cause (Ct. Rec. 65, p. 17). The DNR report following the investigation ruled out lightning, recreation, smoking, heavy equipment, arson, children, fireworks, and power lines as causes of the fire; the report found that the BNSF train caused the fires (Ct. Rec. 65, p. 21).

The Plaintiffs allege that BNSF paid the costs incurred by DNR in suppressing the fires, which DNR had billed to BNSF in the amount of $460,246.22 (Ct. Rec. 69, p. 16).

The Plaintiffs sued BNSF for the damage from the Marshall fires, alleging that BNSF intentionally caused waste and damage to Plaintiffs' property, created a nuisance under RCW 7.48.120 and RCW 7.48.150, intentionally or unreasonably committed common law trespass, "wrongfully, recklessly, and negligently ignited and allowed the fire to escape" to the Plaintiffs' lands in violation of RCW 4.24.040, committed acts subjecting BNSF to liability under RCW 64.12.030 (providing for treble damages), and committed acts subjecting BNSF to liability under RCW 4.24.630 (providing for treble damages, restoration costs, and attorney fees) (Ct. Rec. 53, p. 7-9).

Defendant BNSF raised the following affirmative defenses in its answer: (1) failure to mitigate damages, (2) comparative fault, (3) intervening/superseding cause, (4) non party fault, (5) assumption of risk, (6) federal preemption, (7) waiver/laches, (8) estoppel, (9) offset, (10) release, and (11) accidental, casual, or involuntary conduct (Ct. Rec. 54, p. 7-9).

The parties engaged experts to appraise the damage to the trees on the damaged properties and estimate the property owners' restoration needs. Jim Flott, an arborist who prepared a report for the Plaintiffs, found that the property owners had maintained the area that was burned regularly before the fire (Ct. Rec. 76-1, p. 9). Mr. Flott also found that the property owners removed dead trees and periodically removed understory debris (Ct. Rec. 76-1, p. 9). Roger Kjelgren, a professor at Utah State University, prepared a report for the Defendant that found that the Plaintiffs had not controlled pine seedlings growing around larger, mature trees (Ct. Rec. 76-5, p. 46, 49-50). Dr. Kjelgren reported that these uncontrolled seedlings created a fire hazard that was in place at the time of the fire (Ct. Rec. 76-5, p. 46, 50). Dr. Kjelgren also found that the August 11, 2007, fire spread quickly across the Plaintiffs' properties "because of weather and particularly the abundance of fuel from dead plant material and water stressed trees" (Ct. Rec. 76-5, p. 46).

III. DISCUSSION

As a preliminary matter, the Court notes that the Defendant has withdrawn the following affirmative defenses: intervening/superseding cause, non party fault, assumption of risk, federal preemption, waiver/laches, estoppel, and offset (Ct. Rec. 5, p. 6-7). The Court also notes that the Plaintiffs relied in part on FED. R. CIV. P. 11(b) to support their assertion that the Defendant's denials of liability are frivolous and lack factual support. However, in their reply briefing (Ct. Rec. 82) and at oral argument, the Plaintiffs conceded that they do not seek Rule 11 sanctions and rely exclusively on FED. R. CIV. P. 56 as the federal civil rule

supporting relief. The Court shall not engage, then, in a FED. R. CIV. P. 11 sanctions analysis.

This Court has jurisdiction pursuant to 28 U.S.C. §1332. As such, the Court will apply Washington state substantive law. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

A. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party must demonstrate to the Court that there is an absence of evidence to support the non-moving party's case. *See Celotex Corp.*, 477 U.S. at 325. The burden then shifts to the non-moving party to "set out 'specific facts showing a genuine issue for trial.'" *Celotex Corp.*, 477 U.S. at 324 (quoting FED. R. CIV. P. 56(e)).

A genuine issue of material fact exists if sufficient evidence supports the claimed factual dispute, requiring "a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Service, Inc. V. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987). At summary judgment, the court draws all reasonable inferences in favor of the nonmoving party. If the nonmoving party produces evidence that contradicts evidence produced by the moving party, the court must assume the truth of the nonmoving party's evidence with respect to that fact. *T.W. Elec. Service, Inc.*, 809 F.2d at 631. The evidence presented by both the moving and non-moving parties must be admissible. FED. R. CIV. P. 56(e). Furthermore, the court will not presume missing facts, and non-specific facts in affidavits are not sufficient to support or undermine a claim. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990).

B. Liability as a Matter of Law

In their complaint, the Plaintiffs raised claims of negligence, trespass, nuisance under RCW 7.48.120 (defining nuisance) and RCW 7.48.150 (defining private nuisance), trespass, and negligently igniting and allowing a fire to spread under RCW 4.24.040 (providing for an action for negligently permitting a fire to spread from one's own property to another's) (Ct. Rec. 53, p. 7-8). The Plaintiffs also request treble damages under RCW 64.12.030 and/or RCW 4.24.630 (Ct. Rec. 53, p. 8-9).

The Plaintiffs' summary judgment briefing did not make clear upon which theory or theories of liability the Plaintiffs move the Court to find liability as a matter of law. At oral argument, the Plaintiffs asserted that the motion for a determination of liability as a matter of law is based on its statutory claims, except for nuisance, and its negligence claim.

Negligence requires (1) a duty to conform to a certain standard of conduct owed to the complaining party, (2) a breach of that duty, and (3) a showing that the breach was the proximate cause of the complaining party's injury, and (4) legally compensable damages. *See, e.g., Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999), *aff'd in part, rev'd in part on other grounds*, 155 Wn.2d 306, 119 P.3d 825 (2005). RCW 4.24.040 creates a cause of action for negligently permitting a controlled burn to spread. The elements of negligence apply to that cause of action as well. *See General Ins. Co. Of America v. Norther Pac. Ry.Co.*, 280 U.S. 72, 77, 50 S.Ct. 44 (1929).

Plaintiffs offer the following exhibits in support of their motion: a portion of the DNR Investigation Follow-up Report (Ct. Rec. 69, p. 6-15); a check from BNSF to DNR, care of the Office of Attorney General, for $260,246.22 (Ct. Rec. 69, p. 16); and Defendant's responses to Plaintiffs' Interrogatories, Nos. 8, 9, 10, 11, 12, 14, 15, and 16 (Ct. Rec. 69, p. 17-23).

The Defendant contends that the Plaintiffs cannot rely on the DNR Report

for purposes of summary judgment because it is inadmissible as hearsay and as an unauthenticated document. The Plaintiffs respond that the report qualifies for an exception to the hearsay rule as a public report under FED. R. EVID. 803(8) and is, thus, self-authenticating.

If documents are to be authenticated through personal knowledge to support a summary judgment motion, the proponent of the documents must attach them "to an affidavit that meets the requirements of [FED. R. CIV. P.] 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence." *Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir.1987) (citation omitted); *see also Orr*, 285 F.3d at 774, note 8 ("A document can be authenticated [under rule 901(b)(1) by a witness who wrote it, signed it, used it, or saw others do so.") (quoting 31 Wright & Gold, *Federal Practice & Procedure: Evidence* § 7106, 43 (2000)). A proper foundation also may be established through means other than personal knowledge, including any of the means included in FED. R. EVID. 901 or permitted as self-authenticating by FED. R. EVID. 902 if the proper certification is affixed to the document. *See* FED. R. EVID. 902; *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 775 (9th Cir.2002).

Evidence supporting or opposing a summary judgment motion must be admissible. FED. R. CIV. P. 56(e). The Plaintiffs cite *Alexander v. CareSource*, 576 F.3d 551 (6th Cir.2009), as authority for the proposition that the DNR Report is self-authenticating as a public record. However, *Alexander*, apart from not being binding authority, determined that "lack of personal knowledge is not a proper basis for exclusion of a report otherwise admissible under Rule 803(8)." 576 F.3d at 562-63. The *Alexander* court had made a threshold determination that the report in question was self-authenticating under FED. R. EVID. 902(1) because it contained the seal of the State of Ohio. 576 F.3d at 561. Although FED. R. EVID. 803(8) may resolve the hearsay objection relating to the DNR report here, the report does not satisfy the threshold requirement of authentication. The DNR

report is not self-authenticating; it does not contain a seal, as required by FED. R. EVID. 902(1), or certified as required by FED. R. EVID. 902(2) or (4). The Plaintiffs do not authenticate the document by other means. FED. R. EVID. 901. Therefore, the DNR report is not admissible and the Court will not consider the DNR report for purposes of this motion.

Defendant also challenges the admissibility of the check as unauthenticated and inadmissible hearsay under FED. R. EVID. 801. The Court agrees that the exhibit purporting to be a check from BNSF to DNR is not authenticated. The Plaintiffs have not submitted an affidavit or deposition testimony of anyone with personal knowledge of the check. *See Orr v. Bank of America, NT & SA*, 285 F.3d 764, 777 (9th Cir.2002). Nor have the Plaintiffs utilized alternative means of authentication under FED. R. EVID. 901 or FED. R. EVID. 902. The Court, therefore, cannot consider the DNR Report or the check for purposes of this summary judgment motion. FED. R. CIV. P. 56(e).

For the Court to grant summary judgment, the Plaintiffs must show the absence of a genuine issue of material fact on each essential element of their theories for liability, for which the Plaintiffs will have the burden of proof at trial. *See Miller v. Glenn Miller Productions, Inc.*, 454 F.3d 975, 987 (9th Cir.2006). The Plaintiffs have not addressed several essential elements of negligence or their claim under RCW 4.24.040. The evidence remaining for the court to consider are the Defendant's responses to the Plaintiffs' interrogatories, which only support that the Defendant stated repeatedly that their investigation was "in its preliminary phases" (Ct. Rec. 69, p. 17-23). The Plaintiffs emphasize that the Defendant failed to supplement their responses later in discovery. (Ct. Rec. 68, p. 3). But these facts do not support the Plaintiffs'assertion that all of the essential elements of negligence or permitting a fire to spread under RCW 4.24.040 are undisputed. The Plaintiffs, therefore, have not met their burden of demonstrating that they are entitled to judgment as a matter of law on the issue of liability for negligence

claims. FED. R. CIV. P. 56.

C. Affirmative Defenses

1. *Failure to Mitigate*

The nonmoving party may avoid summary judgment against it only by showing a genuine issue of material fact as to an essential element on which that party will bear the burden of proof at trial. *Lake Nacimiento Ranch Co. v. San Luis Obispo County*, 841 F.2d 872, 876 (9th Cir.1987).

Plaintiffs contend that BNSF has produced no evidence to support that any of the Plaintiffs failed to use reasonable efforts to mitigate their damages or to support the amount by which the damages would have been mitigated. The Defendant responds by submitting portions of deposition testimony of three of the Plaintiffs, Scott Simmons, Charles Potter, and Keith Geschke. Mr. Simmons testified that in November 2009 he was still in the process of removing burnt trees from the August 2007 fire (Ct. Rec. 76-2, p. 37). Mr. Potter also testified to being in the process of removing trees in December 2009 (Ct. Rec. 76-3, p. 40). The Plaintiffs reply to the Defendant's use of this evidence by offering that there could have been an alternative reason for not clearing away the burnt trees, such as inability to afford the costs of removal (Ct. Rec. 82, p. 5). Plaintiffs also argue that it was the Defendant's own request to leave the property in its post-fire condition for purposes of investigation by defense experts, a request that Plaintiffs accommodated and that prevented Plaintiffs from removing burnt debris sooner (Ct. Rec. 82, p. 5). In support of this argument, Plaintiffs submit e-mail correspondence between Plaintiffs' and Defendant's counsel indicating that Defendant's counsel released Plaintiffs from their agreement to preserve the property in its post-fire condition on May 21, 2009 (Ct. Rec. 83, p. 4).

The Defendant also asserts that plaintiff Keith Geschke testified that he did not remove burnt trees as of the date of his deposition (Ct. Rec. 75, p. 7), and

Defendant's counsel's declaration states that a portion of Keith Geschke's deposition transcript is attached to the declaration (Ct. Rec. 76, p. 2). However, the deposition of Keith Geschke's brother, Randy Geschke, instead is attached and does not support Defendant's assertion.

So the question is whether Mr. Simmons's and Mr. Potter's statements demonstrate a genuine issue of material fact that should preclude summary judgment dismissal of the Defendant's failure to mitigate affirmative defense. In Washington the mitigation of damages defense "prevents an injured party from recovering damages that the party could have avoided through reasonable efforts." *Jaeger v. Cleaver Const., Inc.*, 148 Wn. App. 698, 714, 201 P.3d 1028 (Wash. App. Div. 2 2009) (citing *Labriola v. Pollard Group, Inc.* 152 Wn.2d 828, 840, 100 P.3d 791 (2004)). The person who stands to suffer a loss because of another's wrong may exercise significant discretion. *Jaeger*, 148 Wn. App. At 714-15.

Defendant appears, based on evidence submitted by the Plaintiffs, to have released Mr. Simmons, Mr. Potter, and the other Plaintiffs from an agreement to preserve the property in its post-fire condition in May 2009 (Ct. Rec. 83, p. 4). Mr. Simmons testified in his November 2009 deposition that he was still in the process of removing burnt trees from his property (Ct. Rec. 76-2, p. 37). Mr. Potter similarly stated in December 2009 that he had hired friends to help him take down and remove the remaining burnt trees, which constituted at that time approximately half of those damaged by the 2007 fire (Ct. Rec. 76-3, p. 40). Summary judgment would be appropriate on this affirmative defense only if the reasonableness of the Plaintiffs' courses of action regarding tree removal after the fire were beyond question. *See Briskin v. Ernst & Ernst*, 589 F.2d 1363, 1368 (9th Cir. 1978). The Court finds that there remains a genuine issue of material fact for the factfinder as to whether the Plaintiffs faced more than one reasonable option and simply chose one of them by waiting to remove all of the burnt trees from their properties. *See Jaeger*, 148 Wn. App. At 714-15. Therefore, the Court finds

that summary judgment on Defendant's failure to mitigate affirmative defense is not justified.

2. *Comparative Negligence*

The Plaintiffs argue that there is no evidence that the Plaintiffs caused the fires or acted in any way that demonstrated fault, carelessness, negligence, or gross negligence (Ct. Rec. 67, p. 9). The Plaintiffs also contend that the Defendant must show that the Plaintiffs fell short of a specific duty of care to survive summary judgment on this affirmative defense (Ct. Rec. 82, p. 6). The Defendant responds that a contradiction between two expert reports is evidence of an issue of material fact (Ct. Rec. 75, p. 8).

Washington's comparative fault statute apportions damages between a negligent plaintiff and a negligent defendant. *Geschwind v. Flanagan*, 121 Wn.2d 833, 837, 854 P.2d 1061 (1993); RCW §§ 4.22.005, 4.22.015. The definition of "fault" includes "acts or omissions . . . that are in any measure negligent or reckless toward the person or property of the actor or others . . . [,] unreasonable assumption of risk, and unreasonable failure to avoid an injury or to mitigate damages." RCW 4.22.015. Plaintiff's fault requires proof of the same elements required to prove a defendant's fault: (1) a duty that the plaintiff owed him- or herself, (2) breach of the duty, (3) legal causation, and (4) damages. *See* RCW 4.22.015; Ryan P. Harkins, *Holding Torfeasors Accountable: Apportionment of Enhanced injuries*, 76 WASH. L. REV. 1185, 1191 (2001). "Generally, the issue of contributory negligence is one for the jury." *Geschwind*, 121 Wn.2d at 837.

Defendant proffers evidence that the parties' respective experts, who prepared reports appraising the damage to the Plaintiffs' trees and other property, presented conflicting findings as to the Plaintiffs' pre-fire maintenance of their properties. The Plaintiffs' expert, Mr. Flott, found that the Plaintiffs had removed dead trees and periodically removed understory debris (Ct. Rec. 76-1, p. 9). The Defendant's expert, Dr. Kjelgren, reported that the Plaintiffs had not controlled

volunteer seedlings on their properties, which created a fire hazard that was in place at the time of the fire (Ct. Rec. 76-5, p. 46, 50).

The Court finds that this conflicting evidence creates a genuine issue of material fact on the element of breach of duty that makes summary judgment inappropriate for the Defendant's comparative fault defense.

Accordingly, **IT IS HEREBY ORDERED:**

1. The Court notes that Defendant has withdrawn all but two of its affirmative defenses: failure to mitigate and comparative fault. The Defendant's claimed defense of "Accident/Casual/Involuntary," (Ct. Rec. 54, p. 8) is not an affirmative defense and is addressed by the Court's order at Ct. Rec.117.

2. Plaintiffs' motion for summary judgment (**Ct. Rec. 66**) is **DENIED** . The Court declines to find liability as a matter of law, and the Court declines to dismiss Defendant's mitigation of damages and comparative negligence affirmative defenses.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and forward copies to counsel.

DATED this 8th day of April, 2010.

s/ Rosanna Malouf Peterson
ROSANNA MALOUF PETERSON
United States District Court Judge